Office-Supreme Court, U.S.
FILED
FEB 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1071

CHARLES FARMER,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, Charles Farmer, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above case on November 21, 1966.

Opinions Below

The opinions of the Supreme Court of New Jersey, printed in the appendix herein, *infra*, pp. 1a-50a are reported in 45 N. J. 520 (1965) and 48 N. J. 145 (1966).

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on November 21, 1966 (App. 51a). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. §1257 (3).

Questions Presented

1. Is the Fifth Amendment's prohibition against placing an accused in double jeopardy applicable in state court prosecutions under the Due Process Clause of the Fourteenth Amendment?

2. Was petitioner placed in double jeopardy when the trial court declared a mistrial after the jury had been impaneled and testimony taken where the prosecuting attorney's failure to carry out the order of the court below was the producing cause of the mistrial?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION — Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION — Fourteenth Amendment

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due proceses of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW JERSEY CONSTITUTION, 1947 — Article I, Paragraph 11

> "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."

Statement of the Case

On November 15, 1963, the Grand Jury of Middlesex, County, New Jersey indicted petitioner, Charles Farmer, for first degre murder of his wife, Barbara Farmer, on September 18, 1963. After wounding himself, petitioner was taken to St. Peter's General Hospital in New Brunswick, New Jersey where he remained under treatment for some time. On February 3, 1964, following a hearing which began on January 22, 1964, the Superior Court of New Jersey, Law Division, found him mentally incompetent to stand trial and committed him to the State Hospital for the criminally insane. See *Farmer* v. *State*, 42 N. J. 579 (1964). Subsequently, on May 25, 1965, again after a hearing, the Law Division declared him mentally fit for trial.

On July 14, 1965, petitioner moved in the trial court for an order to permit pretrial discovery of the State's case. Specifically he asked leave "(a) To inspect, copy and photograph all statements, papers and confessions concerned with the within indictment; (b) To inspect and copy all those grand jury minutes concerned with the within indictment. (c) To inspect and copy all medical, psychiatric and neurological reports pertaining to the defendant. (d) To inspect and copy all ballistic reports and paraffin reports made in connection with any firearms allegedly used in connection with the death of Barbara Farmer. (e) To examine any and all firearms and instruments concerned with the within indictment. (f) To inspect, copy and photograph all photographs concerned with the within indictment. (g) To inspect and examine any clothing worn by Barbara Farmer or Charles Farmer on September 18, 1963." This request was granted by the trial court and an order was entered. Thereafter, the State of New Jersey sought leave to appeal from paragraphs (a) and (b) of the order which gave leave to the petitioner (a) to inspect, copy and photograph all statements, papers and confessions concerned with the within indictment. (b) To inspect and copy all those grand jury minutes concerned with the within indictment. The Supreme Court of New Jersey granted leave to appeal and affirmed the trial court's order. *State* v. *Farmer*, 45 N. J. 520 (1965) (App. 1a-4a). In accordance with the order for discovery, the State delivered to petitioner the grand jury testimony, statements of five witnesses and notes on interviews of approximately six other witnesses.

On January 4, 1966, trial of the indictment commenced with the impaneling of a jury. A mistrial was granted by the court with consent of the State and the petitioner, based

on conclusion that the jury panel was contaminated. On January 17, 1966, the second trial of the indictment began and two weeks were consumed before a full panel of 14 jurors was completed. Trial terminated February 3, 1966, when the trial court declared a mistrial over the strenuous objection of the petitioner (D16). The State had called two witnesses; one, a member of the local police department; the other, an indentification officer attached to the prosecutor's staff. The third witness offered by the State was Sgt. Earl Eichler of the Highland Park, New Jersey Police Department. The Sergeant testified that he found himself in the room with the decedent and the petitioner soon after the occurrence. When asked to testify as to a statement allegedly made by the petitioner, counsel for petitioner inquired of the Prosecutor whether the witness had ever given a statement to the Prosecutor's office and, if so, why a copy thereof had not been given petitioner pursuant to the order of discovery. This inquiry disclosed that the Prosecutor had not only a statement of the witness, Eichler, but had in his possession some 28 other statements allegedly made by police officials, none of which statments had been exhibited to petitioner. The State represented that it intended to call as witnesses the makers of such statements.

After a recess was taken, the trial judge declared that he was satisfied that the failure of the State to submit the reports to the petitioner was the result of a misinterpretation of the discovery order and not a deliberate attempt to deny petitioner the information contained therein. The trial court thereupon granted a mistrial over the objections of both defendant and the State. Thereafter, petitioner moved for a dismissal of the indictment on the ground that a new trial would place him in double jeopardy in violation of the Fifth Amendment to the United States

Constitution, and of Article I, paragraph 11 of the New Jersey Constitution. The motion was denied in an unreported opinion (D13) in which the trial judge reiterated his opinion that the prosecutor had acted in good faith in interpreting the discovery order. The trial judge also declared that even though the prosecutor's interpretation was erroneous and must bear the entire responsibility for the situation resulting in the need for the mistrial, under all the circumstances of the case, it would not be fundamentally unfair to require retrial of the defendant. The Supreme Court of New Jersey affirmed the order of the trial court and held that defendant would not be placed in double jeopardy. 48 N. J. 145 (App. 6a-50a).

Reasons for Granting the Writ

I. This Court in *Cichos* v. *Indiana* granted *certiorari* on the same question presented herein. However, after hearing the matter, this Court did not reach or decide the question tendered by the petition for *certiorari* and the writ was dismissed as improvidently granted. —— U. S. ——, 17 L. ed. 2d 175, 89 S. Ct. ——.

Prior to the decision in *Cichos* v. *Indiana,* this Court has had occasion to consider the question whether the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States. In *Palko v. Connecticut,* 302 U. S. 319, 58 S. Ct. 149, Mr. Justice Cardozo perceived the principle in these terms: the Due Process Clause of the Fourteenth Amendment prohibited the States from enforcing their criminal laws at the cost of violating some fundamental precept of justice, of imposing a "hardship so acute and shocking that our polity will not endure it.

Thereafter, in *State of Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459, 462-463, the case of an unsuccessful

execution, Mr. Justice Reed, writing for himself, Chief Justice Vinson, Mr. Justice Black and Mr. Justice Jackson declared that "our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense," and concluded, *inter alia*, not that the Due Process Clause has no double jeopardy content, but that there is "no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution." Mr. Justice Frankfurter, concurring in the judgment to form the majority stated that the Due Process Clause viewed as prohibiting fundamentally unfair state procedures, had some double jeopardy content, while the dissenters did not concern themselves with double jeopardy, but only with the claim that a second attempt to execute the prisoner would be a cruel and unusual punishment. Then followed *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948), where a unanimous Court held, without reserving the question of whether the Due Process Clause of the Fourteenth Amendment had any double jeopardy content, that a multiple offender statute does not subject "petitioner to double jeopardy," since the sentence as a multiple offender is not "viewed as either a new jeopardy or additional penalty for the earlier crimes."

This Court was not unanimous in *Brock* v. *State of North Carolina*, 344 U. S. 424, 73 S. Ct. 349 (1953), yet the difference arose not so much from the general proposition that the Due Process Clause places some limits on the power of a state to reprosecute, but from the application of this proposition to the particular reprosecution challenged—the State retried the petitioner after the first trial was halted and a mistrial declared because of the temporary unavailability of testimony by witnesses for the prosecution. The concurring Justice (Frankfurter, J.) and the dissenting Justices (Vinson, C.J. and Douglas, J.) em-

braced this general proposition, and although Mr. Justice Minton, writing for the Court, was less explicit, he did perceive the question presented (using the language of *Palko*), as whether "that kind of double jeopardy" was "a hardship so acute and shocking that our polity will not endure it." *Wade* v. *Hunter,* 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949), a case under the Double Jeopardy Clause of the Fifth Amendment was used to justify a negative answer to this question in *Brock.* Similarly in *Hoag* v. *State of New Jersey,* 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958) there was acknowledgment that certain state reprosecutions would be constitutionally impermissible. The petitioner was alleged to have robbed five persons on the same occasion. He was first tried and acquitted for robbing three of the victims; and the Supreme Court held that a second trial based on an indictment charging him with robbing the fourth victim was not an "impermissible use of multiple trials. Yet its premise was that some uses of multiple trials would be constitutionally impermissible. See 356 U. S. at 467-469, 78 S. Ct. at 833. See also *Ciucci* v. *State of Illinois,* 356 U. S. 571, 78 S. Ct. 839, 2 L. Ed. 2d 983 (1958) fragmented prosecution for homicide.

In *Bartkus* v. *State of Illinois,* 359 U. S. 121, 79 S. Ct. 676 (1959), this Court apparently assumed that there is some double jeopardy content to the Fourteenth Amendment. A State reprosecution following an acquittal in a federal prosecution for the same conduct, robbing a federally insured savings and loan association, was held permissible only because it was viewed as a reprosecution by another sovereignty for a crime against it. See also *Abbate* v. *United States,* 359 U. S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959). The Court's opinion in *Bartkus,* written by Mr. Justice Frankfurther, contains abundant suggestions that if the successive prosecutions were both

conducted by the same sovereignty, such as Illinois, the Due Process Clause of the Fourteenth Amendment does impose some restrictions on the power of a state to re-prosecute an individual for the same crime, though we are told by Mr. Justice Frankfurter, that this proposition had been established more than thirty years prior: "[I]n *Palko*, the Court ruled that * * * at some point the cruelty of harassment by multiple prosecutions by a State would offend due process." 359 U. S. at 127, 79 S. Ct. at 680, 3 L. Ed. 2d 684.

Although Mr. Justice Black concurred with the majority in *Cichos* v. *Indiana, supra,* he explicitly stated that he adheres to his views in *Bartkus* v. *Illinois,* dissent, 359 U. S. 121, 150 3 L. Ed. 684, 705 to the effect that the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States.

In the past, this Court has incorporated certain guarantees of the Bill of Rights into the Fourteenth Amendment, thereby making them applicable to the States. Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U. S. 319, 326, 82 L. Ed. 288-292 said that guarantees selected by the Court "have been taken over from the earlier Articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption." See, also, Brennan, The Bill of Rights and the States, 36 N. Y. U. Law Rev. 761 (1961); Henken, "Selective Incorporation" in the Fourteenth Amendment", 73 Yale L. J. 74 (1963).

This Court has heretofore held that other guarantees of the Bill of Rights to be absorbed into the Fourteenth Amendment—the First Amendment; See *e.g. New York Times* v. *Sullivan,* 376 U. S. 254, 84 S. Ct. 710 (1964); the Fourth Amendment, *Mapp* v. *Ohio,* 367 U. S. 543, 81 S. Ct. 1684 (1961); *Ker* v. *California,* 374 U. S. 23, 83 S. Ct.

1623, 10 L. Ed. 2d 726 (1963); the just compensation, See *Chicago B. & Q. Railroad Company* v. *The City of Chicago,* 166 U. S. 226, 17 S. Ct. 581 (1897) and self-incrimination clauses of the Fifth Amendment, *Malloy* v. *Hogan,* 378 U. S. 1, 84 S. Ct. 1489 (1964); *Griffin* v. *California,* 380 U. S. 609, 85 S. Ct. 1229 (1965); The right to counsel, *Gideon* v. *Wainwright,* 372 U. S. 335, 83 S. Ct. 792 (1963) and confrontation clauses of the Sixth Amendment, *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065 (1965) and the Eighth Amendments prohibition against cruel and unusual punishments, *Robinson* v. *California,* 370 U. S. 660, 82 S. Ct. 1417 (1962).

The Supreme Court of New Jersey in the instant case stated that * * * "in view of the more recent cases in that Court, little doubt remains that the double jeopardy clause of the Fifth Amendment is binding on the States by virtue of the Fourteenth Amendment (App. 31a).

II. The decision of the Court below is believed to be erroneous and contrary to the decision of this Court in *Downum* v. *United States,* 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963). A comparison of the facts and rationale of *Downum* with those here reveals that the instant case requires the protection against double jeopardy more so than in *Downum.* In *Downum,* on the morning that the case was called both sides announced ready. A jury was selected, sworn and instructed to return at 2:00 P. M. When it returned, the Prosecutor asked that the jury be discharged because his key witness on two counts of the indictment was not present—a fact discovered by the Prosecutor only during noon recess. It was not contended that the failure to secure the attendance of this witness was in any way deliberate or based upon the Prosecutor's conclusion that the impaneled jury was likely to

acquit. Instead, the "jury first selected to try petitioner and sworn was discharged because a prosecution witness had not been served with a summons and because no other arrangements had been made to assure his presence." This Court held that *Downum* could not be reprosecuted, since, by virtue of prosecutorial neglect, he was denied his constitutional right to have the impaneled jury hear and decide his case. The Court said, "We resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain and arbitrary judicial discretion.' ". 372 U. S. at 378. The later case of *United States* v. *Tateo*, 377 U. S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964) affirms the holding of this Court in *Downum* v. *United States, supra,* and distinguished the facts as follows at page 467: "*Downum* v. *United States*, 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 is in no way inconsistent with permitting a retrial here. There the Court held that when a jury is discharged because the prosecution is not ready to go forward with its case, the accused may not then be tried before another jury. * * *"

In the instant case, the need for the statements in the Prosecutor's possession was vital and necessary to petitioner's defense. For it was the petitioner's contention before the trial court and the New Jersey Supreme Court that he could not recall the circumstances of the shooting. Because of the insanity defense and lack of memory of the shooting, the trial court and the Supreme Court of New Jersey ordered the delivery of all statements, papers and documents connected with the within indictment. See, *State* v. *Farmer*, 45 N. J. 520 (App. 1a-3a). The failure to carry out the mandate of the court below by the prosecution was revealed at the trial, after the jury was impaneled and witnesses sworn. The trial court declared a mistrial on its own motion and concluded that the Prosecutor's interpre-

tation of the New Jersey Supreme Court's order was erroneous and must be regarded as the producing cause of the mistrial but that under the circumstances of the case, it would not be fundamentally unfair to require retrial of the defendant (App. 29a). The court below agreed with this conclusion characterizing the State's action as "good faith error" (App. 36a).

Retrial following discharge of a jury is prohibited unless the mistrial was granted with defendant's consent, which is not present here, or out of manifest necessity. *Wade* v. *Hunter,* 336 U. S. 684, 93 L. Ed. 974. The courts have recognized necessity when there is a breakdown of judicial machinery, *Gori* v. *United States,* 367 U. S. 364, 372; when the first jury is hung, *United States* v. *Perez,* 22 U. S. (9 Wheat) 579; a juror is disqualified, *e.g. Simmons* v. *United States,* 142 U. S. 148; the trial judge dies, *Freeman* v. *United States,* 237 Fed. 815; or war closes the court, *Wade* v. *Hunter,* 336 U. S. 684. Other instances of imperious necessity are cited by Justice Douglas in his dissenting opinion in *Gori* v. *United States,* 367 U. S. at page 371.

The prohibition is not against being twice punished, but against being twice put in jeopardy. *United States* v. *Ball,* 163 U. S. 662, 669, 41 L. Ed. 300, 302, 16 S. Ct. 1192. The rationale of the doctrine of double jeopardy was expressed by the Court in *Green* v. *United States,* 355 U. S. 184, 187, 2 L. Ed. 2d 199, 78 S. Ct. 22. "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state

of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

It cannot be contended that the injury to petitioner was less substantial than the injury to *Downum*. Each was deprived of his "valued right to have his trial completed by a particular tribunal". *Wade* v. *Hunter, supra*. Petitioner was subjected to the taking of evidence; *Downum* was not. The material ordered delivered to petitioner before trial was withheld until the jury was impaneled and trial commenced. The Prosecutor's action was the producing cause of the mistrial.

We submit that the questions posed herein are of substantial constitutional dimensions meriting a determination by this Court and that the New Jersey Supreme Court has decided a constitutional question not in accord with the applicable decisions of this Court.

CONCLUSION

Wherefore, for the reasons above stated, it is respectfully submitted that this petition be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]